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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SAMUEL JOSEPH RUGENDORF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Rehearing

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May It Please The Court:

With profound apologies to the court and to all who are affected by its decisions, we acknowledge that the opinion filed by your Honors on March 30, 1964 is very probably the product of the oral presentation on the part of the petitioner. In retrospect, it is clear to us that we did not discharge our duty to impart satisfactorily to your Honors an explanation of the issues, principles, and significance underlying this case.

Through our fault, there has evolved an opinion whose effect will be the practical nullification of the guarantees of the Fourth Amendment.

Implicit in your Honors' present decision are three propositions: First, that disclosure of the identity of a confidential informant can *never* be compelled in any proceeding in which a criminal defendant seeks to invalidate a search warrant by attempting to show that the informant did not exist, or was not known to be reliable, or is in fact nothing more than a euphemism for a wiretapper.

Secondly, this court now holds that in order to protect his rights under the Fourth Amendment, a defendant must somehow perform the impossible task of showing that the officer did not rely on an informant of past proven reliability, before he will be permitted to learn anything which might enable him to make such proof.

Third, and a lesson which will quickly be absorbed by police agencies: An officer who misconducts himself preliminary to a search, need only ask a fellow officer to make the affidavit for the warrant. In that way, he is immunized against the consequence of any falsehoods or misconduct. For the affiant will know only what his brother officer has told him, and, therefore, cannot possibly be shown to be lying. The officer guilty of the misconduct, on the other hand, is not the affiant, so that his lies are immaterial; and at any event, it is the burden of the defendant to take his chances by calling as his witness the very agent whom he accuses of lying in obtaining the warrant, even though that lie may have been established by extrinsic evidence.

The doctrines above stated are assuredly not spelled out within your Honors' opinion. Your Honors would recoil from any such direct expression. But those doctrines are

inescapably implicit within that decision. As previously stated, we regard this as the consequence of our own shortcomings in our presentation to this court. But we are hopeful that your Honors will not see fit to express the court's dissatisfaction with the presentation made by petitioner's counsel, by expressing a precedent which will weaken the effectiveness of basic constitutional guarantees.

In the hope of amelioration of this situation, we submit to your Honors the following points:

I.

THE SUPPRESSION OF THE EVIDENCE

The present opinion proceeds upon the premise that probable cause for the search warrant, is a totally discrete issue from the right of the defendant to compel disclosure of an informant's identity in a proceeding attacking that warrant. We readily concede—indeed, we urge—that this misconception of our position is the consequence of our own failing before your Honors. But we feel that we have misled your Honors into a position both illogical and dangerous. We would here attempt such rectification as is possible at this juncture.

As your Honors have here stated, this Court has never passed directly on the extent to which a warrant, valid on its face, may be subjected to extrinsic attack in an attempt to show that the probable cause appearing on the face of the warrant does not in fact exist. The opinion proposes to defer this issue.

But the opinion actually *decides* that issue in the most definitive manner possible. The opinion holds that *because* there was probable cause for the warrant, and because the petitioner did not show any *vital* falsehoods in the affidavit, petitioner was not entitled to the name of the informant in his attack upon the search warrant.

In effect, your Honors have held that because probable cause existed, the petitioner was not entitled to attempt a showing that probable cause did not exist. The conclusion, in short, is implicit in the premise.

But probable cause was "found" to exist in this case only by the police authorities. There was never a *judicial* check on that "finding."

With your Honors' indulgence, we would here attempt an analysis of what we believe to be the fundamental basis for the present opinion.

The heart of the issue:

ALL SEARCH WARRANTS ARE NOT ALIKE.

We believe that the fundamental issue in this case may well rest with the question posed by Mr. Justice Black on oral argument: Can a search warrant, valid on its face, be the subject of a judicial examination to determine whether its issuance was error?

We believe that much of the confusion beclouding this issue in the past, has resulted from a failure to distinguish between search warrants issued pursuant to true judicial inquiry, on the one hand, and search warrants issued ministerially, on the other.

And there *is* such a thing as a search warrant ministerially issued. Let there be no doubt of that. The search warrant in the case at bar is one of these.

The question of the availability of an attack on a presumptively valid search warrant, is debatable only because suppression of evidence is the judicial method of "punishing" the "constable [who] has blundered * * * [in order to] compel respect for the constitutional guarantee in the only effectively available way by removing the incentive

to disregard it". *Elkins* v. *United States*, 364 U.S. 206, 216-217, 4 L.Ed. 2d 1669, 1677. The corollary argument, frequently debated, is this: If a *jurist* issues an improvident search warrant, it is an obvious absurdity to speak of "punishing" the judiciary, or removing its "incentive to disregard" constitutional guarantees. Thus, the whole basis for the exclusionary rule can be argued to be nonexistent in such a case.

But this argument cannot be applied to *all* search warrants issued by a magistrate. In some warrant cases, a magistrate exercises a judicial function. In others, he does not.

Let us suppose that a witness comes to a policeman to complain of a crime. Two alternatives are available to the policeman, under the terms of your Honors' decision in this case.

First, the policeman may simply bring the witness before a magistrate, and stand by while the magistrate examines the witness. If the magistrate finds probable cause and issues a warrant, the policeman would then execute that warrant. We must concede that a warrant thus issued, if regular on its face, would not be susceptible to subsequent attack on a factual basis. The policeman would have performed only the classic ministerial function of his office. The determination of the complainant's reliability would have been made as a judicial act, by the magistrate.

But under the terms of your Honors' present decision in this case, the policeman has a second alternative. He can treat his witness as a "confidential informant." He can go before the magistrate and say only that he has an informant of demonstrated reliability. The determination of reliability, and thus of probable cause itself, is made by the policeman, not by the judiciary. Paraphrasing the oral

argument to your Honors by government counsel in this case, the policeman may say to the Commissioner:

> "I refuse to bring my confidential informant into this building because there are many security risks present, ranging from elevator operators to professional defense lawyers; and I refuse to tell you who he is because, Mr. Commissioner, I am frankly not too sure about you. If you refuse me a warrant, my suspicions will be confirmed, and I will thereby be required to treat as reliable any derogatory information that I may hereafter receive, Mr. Commissioner, concerning yourself."

This giant step on the road to a police state is no longer purely hypothetical. It is vividly real, in the light of the present decision.

But the point is, that in these circumstances, the magistrate serves a function analogous to that of a motor vehicle license examiner. The papers are in proper form, or they are not; but the *substance* is not a matter of his concern. In short, "No real judicial check [will] ever take place." *Costello* v. *United States*, 9 Cir., 298 F. 2d 99, 102. The judicial function is not performed in such a case, but is surrendered to the police officer. In such a case, we urge, a reasonable opportunity to challenge the police officer's determination concerning the reliability of his informant, is indispensable if the concept of separation of powers is to be observed. The exclusionary rule should properly apply.

II.

THE EFFECT OF THE FACTUAL INACCURACIES PROVEN BY PETITIONER

The majority holds that the factual inaccuracies proven by the petitioner "were of only peripheral relevancy to the showing of probable cause and, not being within the

personal knowledge of the affiant, did not go to the integrity of the affidavit."

We are most fearful that this language will have the unfortunate effect of encouraging policemen, in future cases, to tell their story to a brother officer and send him before the Commissioner, as was done here, rather than sign the affidavit personally. The inaccuracies (to use a charitable term) were those of a full-time credential-carrying government agent. The affiant himself could not possibly be "inaccurate" because he was merely repeating what his brother agent had told him. But surely, a false statement of a government agent, included within a government affidavit, is equally offensive whether the affidavit be signed by the agent with whom the false information originates, or whether it be signed by a brother agent on a hearsay basis. There is no logical distinction between the two. The "integrity of the affidavit" is non-existent in either case.

On the issue of relevance, we can only say that petitioner made as strong a showing of falsehood in the affidavit as any defendant will ever be able to make if he be denied all knowledge concerning the supposed informant. For in an ultimate sense, *everything* except the reliability of the informant is of "peripheral relevancy to the showing of probable cause."

The opinion suggests that the inaccuracies in the affidavit were not fully explored because *petitioner* did not call agent McCormick as a witness. But the petitioner made a prima facie showing that either agent McCormick had lied to the agent affiant, or the agent affiant had lied about what McCormick told him. Surely, in these circumstances it cannot be contended that the burden was on petitioner to call McCormick. If McCormick's evidence were rele-

vant, it would seem clear that it was the government's duty to obtain his evidence. It is hard to see why petitioner should be required to call as his witness, the very government agent whose truthfulness he has attacked, and for whose reliability he is obviously unwilling to vouch.

Petitioner made a prima facie showing. If any unfavorable inference is to be drawn, or any failure of duty found in the failure to obtain the evidence of McCormick, it is very clearly that of the government and not that of the petitioner.

III.

THE TRIAL RECORD

Conceding the imperfections of our trial record, this court has never, to our knowledge, insisted upon record perfection as a basis of either affirmance or reversal of a conviction. We would ask your Honors to remember that the ground used in the trial court for denial to the petitioner of information concerning the informant, was that such disclosure "would cause a possible murder." (R. 22). Objections on this ground were sustained repeatedly by the trial court, which ultimately flatly foreclosed all further questioning concerning the informant (R. 24).

In the face of such foreclosure, it is difficult to imagine how trial counsel can now be charged with waiving petitioner's rights by failing to pursue the matter further.

But at any event, the grounds upon which petitioner was denied information relating to the informant were equally valid in both the search warrant proceeding and the trial on the merits. The supposed "possible murder" was no more and no less likely whether the disclosure be made on the hearing or at the trial. The effect of the ruling was clearly not limited by reason of the nature of the hearing.

The issue of relevancy was never raised at the trial. We are hopeful that your Honors will not permit the government to prevail in this court on grounds so profoundly disparate from that which enabled them to prevail in the trial court.

The vice of such practice is obvious in the result here. The petitioner was denied relief in the trial court under circumstances which made it very clear that he had nothing to gain by reviving the issue ten minutes later at the trial itself, and that he was in fact foreclosed from doing so. In this Court, the government has prevailed because the defendant did not do that which the trial court expressly foreclosed him from doing.

We are prayerfully hopeful that your Honors will not permit such a result.

CONCLUSION.

Mindful of the many burdens upon this court, we pray that your Honors will nonetheless reconsider the present opinion, in view of the gravity of the issues there decided in view of the matters herein set forth.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1963.

Samuel Joseph Rugendorf, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 30, 1964.]

Mr. Justice Clark delivered the opinion of the Court.

Following a trial by jury, petitioner was convicted of violating 18 U. S. C. § 2315 [1] by knowingly receiving, concealing and storing 81 stolen fur pieces, the fur pieces having been transported in interstate commerce and having a value exceeding $5,000. The Court of Appeals sustained the conviction despite petitioner's objections that the evidence was not sufficient to support the verdict; that the fur garments should have been excluded from evidence because they were seized on the authority of a search warrant supported by a deficient affidavit; and that the names of certain confidential informants referred to in the affidavit should have been disclosed. 316 F. 2d 589. We granted certiorari, 375 U. S. 812, and affirm the judgment.

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[1] 18 U. S. C. § 2315:

"Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; . . .

. . . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

how the informants' testimony could help establish petitioner's innocence.

Nor do we believe that the trial court erred in refusing to have the Government disclose the exact date during the week preceding March 16 when the informant saw the furs in the petitioner's basement. It is difficult to see how that date could be useful to petitioner's defense, since the crucial date in the indictment was March 22 and there is no indication that the informant had any knowledge of any events occurring on that date. Petitioner's theory is that if he can find out the date, he may be able to show that he and his wife were away from home at the time when the informant saw the furs, thereby creating an inference that someone else let the informant in and that petitioner did not know of the furs. However, the particular date could not have been of material help to petitioner, as both he and his wife were away from home a major portion of nearly every day during the period in question.

IV.

As to the sufficiency of the evidence, it was undisputed that 81 stolen furs were found in the basement of petitioner's home. The furs were hanging in a closet along with a fur piece admittedly owned by Mrs. Rugendorf. Petitioner's defense was that the furs were placed in the closet without his knowledge while he and his wife were vacationing in Florida and that neither he nor his wife looked into the closet after their return until the officers

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tioner's counsel said: "Here is what Pierce [*sic*] says and here is what United States v. Roviera [*sic*] says: 'When it is demonstrated to the Court that it is essential to the defendant's rights, constitutional rights, that information be given to him so that he can test the validity of the affidavit,' then it must be given to him." Clearly his reliance on *Roviaro* for suppression purposes, which was the sole reason for which it was cited, was entirely misplaced.

executed the search warrant on March 22. Petitioner's brother Leo, petitioner's sister, his son and a neighbor all had keys to his house. Both petitioner and his wife pointed to Leo as the guilty party, but neither Leo nor the other relatives who had keys were called as witnesses. The neighbor, who was called to testify, denied putting the furs in the basement or permitting any other person to use the key.

As early as 1896 this Court dealt with such situations. In *Wilson* v. *United States*, 162 U. S. 613, Chief Justice Fuller held for a unanimous Court that "[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." At 619. Here, it was stipulated that 59 of the furs found in the petitioner's basement were stolen from a fur store in Mountain Brook, Alabama, on February 10, 1962. They were found in a closet opening off a regularly used recreation room. In the same closet was Mrs. Rugendorf's fur piece. Leo Rugendorf, petitioner's brother, was a known receiver of stolen goods and was seen at the home while the Rugendorfs were in Florida. Petitioner testified at trial that Leo had borrowed a key before petitioner went to Florida, and that Leo had not yet returned it. In rebuttal an FBI agent testified that petitioner told him that Leo returned the key soon after the petitioner returned from Florida. In some other respects the testimony of both petitioner and his wife conflicted with the rebuttal testimony of the FBI agents. Apparently the jury simply did not believe the explanation of petitioner and his wife. It may be that the jury's ~~credibility~~ credulity was stretched too far; or, perhaps the failure of the defense to call Leo Rugendorf and the other kinsmen, to

whom they had given keys to the home, appeared strange, especially so, since the neighbor was called to testify about his use of a key. In any event a prima facie case was made out by the stipulation and the presence of the furs in petitioner's home. We cannot say that this was insufficient.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1963.

Samuel Joseph Rugendorf, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 30, 1964.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Brennan and Mr. Justice Goldberg concur, dissenting.

Just prior to the presentation by the prosecution of its first witness at the trial, counsel for petitioner requested the name or names of the informers mentioned in the search warrant:

> "Mr. Echeles: *Roviaro* v. *United States* [353 U. S. 53], which is cited by our Seventh Circuit as authority for this proposition, states that if the informants, if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant. The government has no reason not to give it, said *Roviaro*, and that is the controlling law.
>
> "Let me demonstrate how in our opinion the names of the informants are necessary."

Counsel then went on to argue why disclosure of the informant's name was essential to his motion to suppress. Then he shifted to another attack stating:

> *"I would suggest that not only is this informant necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it*, or possibly his falsity, but I would suggest that perhaps he would be a pretty good witness for the Government, that they ought

I.

The search warrant under attack was issued by the United States Commissioner on the strength of an affidavit dated March 22, 1962, and signed by Marlin Moore, a Special Agent of the Federal Bureau of Investigation. The affidavit stated that Moore had reason to believe that approximately 80 fur stoles and jackets, taken in a burglary in Mountain Brook, Alabama, and worth about $40,000, were concealed in the basement of a single family residence at 3117 West Jarvis Avenue in Chicago.

Moore supported this allegation with statements that L. Dean Paarmann, a Special Agent of the Birmingham, Alabama Office of the FBI, informed Moore that on February 10, 1962, 82 mink, otter, and beaver stoles and jackets (but no full-length coats), worth approximately $42,044, were stolen in Mountain Brook, Alabama, and that on March 16, 1962, a confidential informant who had furnished reliable information in the past told Moore that during the previous week he saw approximately 75 to 80 mink, otter and beaver stoles and jackets (but no full-length coats) in the basement of the home of Samuel Rugendorf at 3117 West Jarvis Avenue, Chicago. The labels had been removed and the informant was told that the furs were stolen.

Moore further supported the allegation with the following statements: FBI Special Agent McCormick advised affiant that a confidential informant whom the FBI had found to be reliable told McCormick that Frank Schweihs of Chicago, and others, committed the Alabama robbery; McCormick told the affiant that on or about March 1, 1962, James Kelleher, a Chicago police officer, said to McCormick "that he saw FRANK SCHWEIHS at RUGGENDORF [*sic*] BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF [*sic*] . . . ; further, Agent McCORMICK ad-

vised this affiant that another confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past told McCORMICK that LEO RUGGENDORF [*sic*] was a fence for FRANK SCHWEIHS; that SAMUEL RUGGENDORF [*sic*] was LEO RUGGENDORF'S [*sic*] brother and was associated in the meat business with his brother."

The affidavit also stated that another FBI Special Agent, J. J. Oitzinger, told the affiant that another confidential informant who had supplied the FBI with reliable information in the past advised Oitzinger that Frank Schweihs, Tony Panzica and Mike Condic were accomplished burglars who disposed of the proceeds of their burglaries through Leo Rugendcrf.

Finally, the affidavit alleged that, upon checking the informant's description of the furs seen at 3117 West Jarvis Avenue, affiant found that the only reported burglary in the United States in the previous six months involving furs of that description and value was the one occurring at Mountain Brook, Alabama.

Pursuant to the search warrant based on this affidavit, a search was made and 81 furs were found in the basement of petitioner's residence. Fifty-nine of these furs had been stolen in Mountain Brook and the other 22, in Shreveport, Louisiana. Prior to trial, the trial court heard testimony on petitioner's motion, under Rule 41 (e) of the Federal Rules of Criminal Procedure,[2] to suppress the use of the seized furs as evidence. The trial court denied the motion insofar as it challenged the legal sufficiency

[2] Rule 41 (e) of the Federal Rules of Criminal Procedure:
"*Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued . . . ."

of the affidavit, but reserved ruling on the truthfulness of the affidavit. During the trial, another hearing was held on the reserved aspect of the motion to suppress and the motion was denied. Also denied was a motion to require the Government to disclose the names of the confidential informants referred to in the affidavit.

II.

Petitioner attacks the validity of the search warrant. This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish "probable cause"; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid. Petitioner contends that probable cause did not exist because the only relevant recitations in the affidavit were the informant's statements that he saw the furs in petitioner's basement and that he was told that they were stolen. However, the informant's detailed description of the furs, including number and type, closely resembled Special Agent Paarmann's description of the furs stolen in Alabama. The affiant checked the burglary report records and found the Alabama burglary to be the only recent one in the United States involving furs of the description and number that the informant saw in petitioner's basement. In addition, the affidavit alleged that Leo and Samuel Rugendorf were brothers and that Leo was a fence for professional burglars. Although one of the informants who gave the latter information added, incorrectly, that Samuel Rugendorf was associated with Leo in the meat business,[3] there was direct information from another in-

[3] In fact, petitioner terminated his business association with his brother Leo and with Rugendorf Brothers Meat Market in 1952.

formant of the FBI that Leo was a fence, and nothing was shown to prove this untrue. The factual inaccuracies depended upon by petitioner to destroy probable cause—*i. e.*, the allegations in the affidavit that petitioner was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit.

We believe that there was substantial basis for the Commissioner to conclude that stolen furs were probably in the petitioner's basement. No more is required. As we said in *Jones* v. *United States*, 362 U. S. 257, 271 (1960):

> "We conclude . . . that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay . . . that the Commissioner acted improperly. . . . He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient."

Petitioner also contends that the withholding of the identity of the informant was a sufficient ground to require suppression of the evidence. But in *Jones*, *supra*, we said that "as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants . . . to be produced . . . so long as there was a substantial basis for crediting the hearsay." At 272. Petitioner's only challenges to the veracity of the affidavit are the two inaccurate facts mentioned above. Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was

associated with Leo in the meat business were not those of the affiant,[4] they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant.

III.

Petitioner also asserts that he was entitled to the name of the informer in order to defend himself at trial on the merits. This claim was not properly raised in the trial court nor passed upon there, and, accordingly, must be denied here. On two occasions—once prior and the other during the trial—petitioner urged his motion to suppress the evidence as to the furs, contending that there were "factual errors" in the affidavit supporting the search warrant. It was solely in support of this motion—not on the merits—that petitioner requested the informants' names. This is made clear by petitioner's motion for new trial:

> "9. The court erred in overruling the defendant's motion for the government to reveal the names of the informers when such information was necessary to the constitutional rights of the defendant *in pursuing his motion to suppress the evidence.*" (Emphasis added.)

He relied entirely on suppression, which, if successful, would have ended the case. Failing in this petitioner asserted, for the first time, in his reply brief in the Court of Appeals that the name of the informant was vital both for the suppression hearing and for the

[4] The affidavit alleged that McCormick told the affiant that police officer Kelleher told him that petitioner was the manager of Rugendorf Brothers Meat Market and that a confidential informant told McCormick that Leo and petitioner were associated in the meat business. Kelleher testified that he did not so inform McCormick. The latter was in the hospital for an operation at the time of trial, but his deposition was not sought nor any postponement requested to enable him to be present.

defense at trial, because the informant alone knew whether he "participated with persons other than the defendant" in placing the furs in the basement. Apparently this was an attempt to bring the facts of the case within *Roviaro* v. *United States*, 353 U. S. 53 (1957), where the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted. But there was not even an intimation of such a situation at the trial here. The necessity for disclosure depends upon "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U. S. 53, 62. Petitioner did not develop any such criteria with reference to the merits of the case. On the contrary, a careful examination of the whole record shows that he requested the informers' names only in his attack on the affidavit supporting the search warrant. Having failed to develop the criteria of *Roviaro* necessitating disclosure on the merits, we cannot say on this record that the name of the informant was necessary to his defense. All petitioner's demands for identification of the informants were made during the hearings on the motion to suppress and were related to that motion.[5] Never did petitioner's counsel indicate

[5] It was during the hearing on the motion prior to trial that petitioner cited *United States* v. *Pearce*, 275 F. 2d 318; *Giordenello* v. *United States*, 357 U. S. 480, and *Roviaro* v. *United States*, 357 U. S. 53. His counsel said: "That is, Giordinella [*sic*] states that the defendant has a right to have such hearing [on suppression]. Pierce [*sic*] and Roviera [*sic*] state we have a right in advance of the hearing to demand the names of the informers if the names are essential to the defense of the defendant *in the prosecution of his petition to suppress the evidence.*" (Emphasis supplied.) And on the second hearing when the Government offered the furs in evidence he again urged his motion, in the absence of the jury, introducing evidence showing the "factual errors" in the affidavit. On arguing the motion, peti-

not to want to hide the witness, that he would pretty much make out a case for the Government. (Italics added.)

"In any event, your Honor, I rely upon United States v. Pearce, 275 F. 2d, our Circuit. I rely upon Rôviaro v. United States, 357 U. S. 53. And I rely upon Giordenello v. United States, 357 U. S. 480, as being the proper procedure that I am trying to get here, your Honor."

It is impossible to say that this motion related wholly to quash the search warrant. It is true that *Pearce* and *Giordenello* involved such motions. But *Roviaro* did not. Rather it presented the same issue this case presents, *viz.*, whether the "informers privilege," 353 U. S., at 59, must give way in the interests of the defense of the accused.

The prosecutor objected, saying "that if the Government is to reveal the name of any informants they might and probably would be killed."

The trial judge denied the motion and the trial started. During the trial the request was repeated, counsel for petitioner saying "I need that information to defend my defendant, Your Honor." Whatever defect, if any, may have been present in his first motion did not appear this time. For now he was plainly addressing himself to the trial on the merits. Once again his request was denied.

It is obvious that these requests were made not only to challenge the sufficiency of the affidavit as a basis of the search warrant, but also for use on the issue of guilt or innocence—*viz.*, knowing possession of stolen goods. The issue was considered by the Court of Appeals,* 316 F. 2d 589, 592; and we should do the same.

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*The majority states that the demand for disclosure as it related to a defense on the merits "was not properly raised in the trial court nor passed upon there, and, accordingly, must be denied here." *Ante*, at —. But the trial excerpts reproduced above amply rebut

Petitioner and his wife were in Florida on vacation between February 17 and March 4, 1962. Before they left Chicago petitioner's brother Leo—an admitted "fence" for stolen goods—came to his house to see him:

> "Leo asked who was going to look after the mail, clean the sidewalks and everything else and he told Leo that his son Jerry would do it. Leo said that Jerry had to open the store every morning and stated that he got down a little later every day and so why not let him watch the house and bring in the mail. Accordingly, he gave his brother the keys.
>
> "From that day, on February 17, 1962, until this day [the time of the trial] he had not seen or talked to his brother Leo; nor had Leo returned the key."

Leo, the brother, had one key to the house during petitioner's absence. His sister, his son, and a neighbor also had keys. Since one of these was a known criminal, and since the informant had personally been in the basement of petitioner's home, the pertinency of the inquiry as to the informant's name becomes obvious.

Speaking of the "informer's privilege," we said in *Roviaro* v. *United States*, 353 U. S. 53, 59: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The priv-

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that contention as it relates to the trial. And the Court of Appeals expressly said:

"The remaining point raised by defendant as error is the refusal of the trial court to require the disclosure of the name of the informer. The defendant relies on *Roviaro* v. *United States*, 353 U. S. 53." 316 F. 2d 589, 592.

As already noted, *Roviaro* did not involve a challenge to the sufficiency of a search warrant. It presented the issue this case does. One requesting disclosure and citing *Roviaro* as authority obviously is seeking to bring himself within the situation to which the *Roviaro* rule is applicable.

ilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

But there are times when the privilege must give way. In *Roviaro,* we put one of those exceptions in these words: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Id.,* at 60–61.

It is difficult to imagine a clearer case than the present one for application of that exception.

The Solicitor General seeks to avoid that conclusion by saying that even though the informant might disclose who stole the furs and how they reached the defendant's basement, "this would not necessarily have cast light upon the issue of petitioner's knowledge." The Solicitor General also argues that it is highly conjectural that identification of the person who admitted the informant to the basement would materially illuminate the question of petitioner's knowledge. We have, however, a case where the only proof implicating defendant was discovery of the stolen furs in his basement. Four keys to the house were in the hands of outsiders, one of whom had a criminal record for trafficking in stolen goods; the stolen furs may have reached defendant's basement during his absence and remained there without his knowledge. His only defense would be proof that someone without his knowledge put them there. Who that person was, when he placed the furs in the basement, what were his motivations in placing the furs there, what were his relations with the defendant, what connections did he have with the stolen articles—these questions go to the very